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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON BUSINESS AND HUMAN RIGHTS: FROM SOFT TO HARD LAW

From soft law to hard law in business and human rights and the challenge of corporate power

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Abstract
We introduce this symposium of articles by explaining the notions of hard and soft law, and reviewing UN developments on business and human rights in this light. We move to a more detailed discussion of existing hard law, particularly the state duty to protect, before examining examples of fulfilment of that duty via the domestication (especially the judicialization) of human rights norms for business. We also note the many pitfalls in contemporary approaches, before examining how the proposed legally binding instrument might address those pitfalls. We conclude with commentary on how soft and hard norms to date have failed to grapple with corporate power, the issue which animates the need for a business human rights debate in the first place, before introducing the articles to follow.

Keywords: BHR treaty; business and human rights; hard and soft law; state duty to protect; UNGPs

1. Introduction

As powerful global actors, corporations are able to greatly impact the enjoyment of virtually every recognized human right, both positively and negatively.[1] On the positive side, corporations can provide employment and help to create wealth: they provide goods and services which enhance lifestyles as well as the enjoyment of human rights. On the negative side, some corporations have been associated with major human rights abuses, including in regard to labour rights, environmental protection, consumer protection, and the rights of peoples living in the vicinity of their operations.

Yet international human rights law remains largely state-centric. It directly binds states, rather than other entities with great power such as corporations. States, in turn, are expected under international human rights law to take reasonable measures to regulate private actors within jurisdiction to prevent them from harming the human rights of third parties, and to investigate and punish such harms if they arise.

This orthodox view does not account for a state being less powerful than the entity it is meant to regulate. Certainly, the state has the monopoly on the legitimate use of force, but this is not the

*We wish to thank the Monash Law Faculty for funding the colloquium in Prato in January 2020, which has led to this symposium of articles.

[1]For an array of positive and negative examples, see 'Human Rights Translated: A Business Reference Guide', 2017, available at www.humanrightstranslated.info.

only type of power. A table of the top 100 states and companies in terms of 2016 revenues revealed that 71 of the top 100 were corporations.[2] While a crude measure, political power is inherently linked to economic power; indeed, it has long been clear that 'state power is not the exclusive governing principle anymore'.[3] Nor does that orthodox view take account of the extraordinary mobility of corporations. While the twin doctrines of limited liability and separate legal personality are important insofar as they prompt entrepreneurial activity without the constant risk of personal ruin, the doctrines can also facilitate the evasion of responsibility and accountability: corporations can structure operations, through those twin doctrines (alongside a legal separation from contractors and sub-contractors), to allocate assets across jurisdictions to minimize accountability and risk.

This problem of a lack of accountability for multinational corporations when they harm the human rights of others is not new. Business and human rights (BHR) has been on the UN agenda for decades. What proved to be a false start in the 1970s petered out in the early 1990s, followed by a revitalization in the late 1990s which continues to the present day. The strategies to induce better corporate behaviour with regard to human rights have swung between proposed hard law instruments and soft law instruments and policies. The same tensions between a preference for hard or soft law approaches persist today, with the dominant international instrument being the unabashedly soft UN Guiding Principles on Business and Human Rights, while an intergovernmental working group at the United Nations is now working on the draft of a new legally binding instrument on business and human rights.

A growing theme in contemporary BHR literature is the degree to which relevant norms are currently hardening, such as through the judicialization of BHR responsibilities in domestic jurisdictions.[4] The articles in this symposium are part of this trend and each provides an exploration of recent developments toward the hardening of corporate human rights duties, in light of the prevailing power of corporations in a globalized economy. This article sets the scene for the symposium as follows.

In Section 2 below, the notions of soft law and hard law at the international level are explored. We summarize the history of international regulatory proposals regarding BHR, including the continuing oscillation between soft and hard law proposals. Despite the apparent predominance of soft law in the area, hard international law obligations remain afoot for states and maybe even corporations, as discussed in Section 3, that is international state duties to protect third parties from human rights breaches by others (including corporations) and the possible extraterritorial scope of that duty, and direct corporate duties under international criminal law. Section 3, particularly in its discussion of the duty to protect, is a prelude to the discussion of its implementation in Section 4, that is its translation into the domestic laws of states, particularly through the judicialization of BHR. Section 4 also introduces examples from the other articles in this symposium. Section 5 then outlines the move towards a BHR treaty, which is currently focused on fleshing out the duty to protect, and how it might (or might not) address some of the problems identified in Section 4.

We conclude this introduction to the symposium in Section 6, where we suggest that neither soft law nor hard law mechanisms will or even can bring deep change unless they grapple with the reality of corporate power, the notion of which animated the concern over BHR in the first place. In this respect, David Birchall has developed a useful analytical framework for thinking about corporate power over human rights, which we adopt in this article. Birchall identifies four sites

[2]M. Babic, J. Fichtner and M. Heemskerk, 'Rethinking the Power of Business in International Politics', (2017) 52 *The International Spectator* 20, at 27.

[3]M. Babic, M. Heemskerk and J. Fichtner, 'Who is More Powerful – States or Corporations?', *The Conversation*, 11 July 2018, available at www.theconversation.com/who-is-more-powerful-states-or-corporations-99616.

[4]See, e.g., C. Bright et al., 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in their Global Value Chains?', (2020) 22(4) *Business and Politics* 667.

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of corporate power, with power understood in terms of the production, by corporations, of effects that shape the capacity of individuals to enjoy human rights.[5] The first is corporate power over the direct rights of individuals, such as that exercised by an employer over worker rights.[6] The second is corporate power over materialities that are fundamental to the enjoyment of human rights, such as land or state revenues.[7] The third is power over governance institutions whose work mediates an individual's human rights possibilities.[8] The fourth is power over discourse, which refers to the capacity of corporations to shape the normative scope of human rights.[9] It is only through engaging with these various sites of corporate power that the BHR movement is likely to have deep impacts in changing the lived experiences of those most impacted by the inequities on which our global economies often pivot. We therefore seek to take up Birchall's call for the BHR movement to engage with the various modalities of corporate power over human rights when thinking about the potential for law to bring about corporate respect of human rights.

2. Business and human rights initiatives – Oscillating hardness and softness

Hard law generally refers to norms which are legally binding. Soft law prescribes norms which are not legally binding. Soft law in some cases is a precursor to the development of hard law norms.[10] For example, many international human rights treaties have been preceded by soft law declarations on the same topic.[11] Soft law norms can also evolve into binding customary international law.[12] This argument is often made, for example, with regard to the Universal Declaration of Human Rights.[13]

However, hard and soft international law are not a perfect binary; rather, international law exists on a spectrum from extreme softness to extreme hardness.[14] Abbott and Snidal outline three aspects in measuring the softness and hardness of law: obligation, precision and delegation.[15] The hardest law imposes legally binding obligations, whereas soft law might set out desirable but non-legally enforceable norms of behaviour. 'Precision' relates to whether the relevant norms are vague or whether they are relatively precise: the latter prescribe certain courses of action and proscribe others, whereas the former may be too broad to provide meaningful guidance. Finally, 'delegation' refers to the existence, or not, of an independent decision-making body to decide on whether norms have been complied with: delegation is reflective of harder than softer law.

Through the history of international efforts to address BHR, the question of whether regulation should be pursued via soft or hard law has been an ever-present theme, which remains true today.

[5]D. Birchall, 'Corporate Power over Human Rights: An Analytic Framework', (2021) 6 *Business and Human Rights Journal* 42, at 43.

[6]Ibid., at 50, 53–6.

[7]Ibid., at 50–1, 56–8.

[8]Ibid., at 51, 58–61.

[9]Ibid., at 51–2, 61–3.

[10]K. W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organisation* 421, at 423.

[11]For example, the two international Covenants were preceded by the Universal Declaration on Human Rights. The International Convention on the Elimination of all Forms of Racial Discrimination 1965 was preceded by a relevant Declaration from 1963.

[12]A. Nussberger, 'Hard or Soft Law – Does it Matter? Distinction between Different Sources of International Law in the Jurisprudence of the ECHR', in A. van Aaken and I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (2018), 41, at 44.

[13]See, e.g., M. A. Glendon, 'The Rule of Law in the Universal Declaration of Human Rights', (2014) 2 *Northwestern Journal of International Human Rights* 1.

[14]J. Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law', in S. Deva and D. Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013), 138, at 142; B. Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights', (2018) 67 ICLQ 961, 962–3.

[15]See Abbott and Snidal, *supra* note 10, at 421, 424.

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2.1 Efforts at the United Nations

In the early 1970s, as part of the push by developing states towards a New International Economic Order (NIEO), the UN first turned its gaze towards the human rights impacts of corporations. The UN Commission on Transnational Corporations (UNCTC) accordingly developed a number of iterations of a Draft Code of Conduct for transnational corporations. As it was never adopted, its intended legal status was never clarified: some proponents hoped for a legally binding instrument while others envisaged a voluntary Code.[16] Often forgotten in contemporary recitals of the history of UN efforts on BHR, the Draft Code[17] covered many issues beyond human rights. Indeed, its main concern was arguably the taming of the broad economic and political impact of companies, which accorded with the NIEO goal of a more just and equitable global economy.[18] That is, the Draft Code was more concerned with the detrimental impacts of transnational corporations on the sovereignty and economies of states, rather than on individual rights.[19] In many respects, the initial Draft Code therefore presented a more radical attempt to confront the power of corporations than the more celebrated recent efforts discussed below, a notion which is explored further in Section 6.

At the behest of the home states of foreign investors, developed states, the Draft Code changed from its earliest iteration as a document focused on the appropriate conduct of business, largely towards states, to a document in two parts that also dealt with the appropriate conduct of states towards business, particularly towards foreign investors.[20] The Draft Code, for example, provided for corporate rights of capital transfer and protections against expropriation. Notably it is the draft provisions on investor rights that have since found their way into hard international law, as discussed in Section 6, with these provisions proving to be a harbinger for bilateral investment treaties which proliferated from the late 1980s.

The Draft Code project, and the UNCTC itself, was terminated in 1992 amidst a fracturing of consensus, especially over the second part of the instrument dealing with investor rights.[21] Its demise was reflective of, but later than, the collapse of the NIEO as a perceived anachronism in the early 1980s in the wake of escalating developing country debts and the burgeoning growth of neoliberalism.[22]

Despite its apparent burial with the UNCTC, the debate over BHR in the UN revived only a few years later. In 1997, the UN Sub-Commission for Human Rights, the subsidiary body to the then UN Commission on Human Rights, embarked upon an examination of the human rights responsibilities of businesses.[23]

While the Sub-Commission commenced its work, the UN adopted the UN Global Compact in 1999. It sets out ten broad principles to guide corporate behaviour, relating to labour rights, environmental impact, anti-corruption[24] and two clauses devoted to human rights. The Global Compact (GC) is essentially a massive global network for corporations and other stakeholders to learn best practices from each other. The only real 'obligation' under the GC is for companies

[16]University of Minnesota Human Rights Library, 'At a Glance' (*comparing the Norms and the UN Draft Code*), available at hrlibrary.umn.edu/ataglance/compdftun.html.

[17]Commission on Transnational Corporations, 'Proposed Text of the Draft Code of Conduct on Transnational Corporations', in United Nations Centre on Transnational Corporations, Transnational Corporations, Services and the Uruguay Round Current Studies, Annex IV, UN Doc. ST/CTC/103 (1990).

[18]J. Bair, 'Corporations at the United Nations; Echoes of the New International Economic Order', (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 159, 161.

[19]It is worth noting that the UNCTC was born in the wake of extreme political interference by corporations in Latin America, particularly Chile and Guatemala.

[20]See Bair, *supra* note 18, at 162.

[21]Ibid., at 163.

[22]Ibid., at 159–60.

[23]Sub-Commission on the Promotion and Protection of Human Rights, Sub-Commission Resolution 97/11 (1997).

[24]The anti-corruption clause was added in 2004.

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to report on their efforts to embed the 10 principles into their operations: chronic non-reporting may result in their removal from the initiative.[25] Of all the instruments mentioned here, the GC is probably the softest:[26] it is non-binding, its norms are broad and vague, and there is no body to which interpretation or decision-making power is delegated. In 2015, its then CEO, Lise Kingo, described the initiative as a 'guide dog' rather than a 'watchdog'.[27] Concerningly, one of the impacts of the Global Compact may be to have helped build corporate power, in the sense of Birchall's fourth kind of corporate power, through increasing corporate influence over the BHR discourse at the UN.[28]

The result of the Sub-Commission initiative, led by Professor David Weissbrodt, was the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (the Norms), which were adopted in 2003[29] and delivered for consideration to the Human Rights Commission, effectively forcing the matter onto its agenda. The Norms were not a legally binding instrument. However, they were written in the language of obligation, seemingly paving the way for the creation of a legally binding instrument to be drafted in similar terms. Unlike the Draft Code, the Norms were not grounded in a vision that corporations be regulated to ensure the capacity of states to realize national social and economic development.[30] The proposed corporate obligations were nevertheless extensive, including duties for each business enterprise to respect, protect and fulfil human rights within their sphere of influence. The Norms were clearly pointing towards non-voluntary binding hard international obligations for companies towards individual rights-holders.[31]

The Commission did not adopt the Norms, so they remain a 'Draft' much like the Draft UN Code.[32] Instead, the UN Secretary General appointed Professor John Ruggie of the Harvard Business School to the role of Special Representative of the Secretary General on Business and Human Rights (SRSG) to investigate the issue of BHR over three years.[33]

Business was, perhaps unsurprisingly, overwhelmingly resistant to the signposting of extensive hard law human rights accountability by the Norm project.[34] Regardless, the SRSG was overly savage in rejecting the Norms in his first report:

> . . . the flaws of the Norms make that effort a distraction from rather than a basis for moving the Special Representative's mandate forward. Indeed, in the Special Representative's view the divisive debate over the Norms obscures rather than illuminates promising areas of

[25]See www.unglobalcompact.org/participation/report.

[26]See Choudhury, *supra* note 14, at 968.

[27]See www.dw.com/en/global-compact-a-guide-dog-not-a-watchdog/a-18781065.

[28]S. Deva, 'From "Business or Human Rights" to "Business and Human Rights": What Next?', in S. Deva and D. Birchall (eds.), *Research Handbook on Human Rights and Business* (2020), 6.

[29]Sub-Commission on the Promotion and Protection of Human Rights, Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, Resolution 2003/16 (2003).

[30]See Bair, *supra* note 18, at 167–9.

[31]D. Weissbrodt and M. Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights', (2003) 97 *American Journal of International Law* 901, at 913–15.

[32]See Nolan, *supra* note 14, at 150. The Norms were neither adopted nor rejected by the Commission.

[33]The SRSG's original mandate is set out in UNCHR, Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/RES/2005/69 (2005). The UN Commission on Human Rights was succeeded by the UN Human Rights Council in 2006, with the latter body extending the SRSG's mandate for a further three years in 2008: UNHRC, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/8/7 (2008).

[34]See, The Joint Submission by the International Chamber of Commerce and the International Organization of Employers to the Commission on Human Rights Urging it to Reject the Norms, 24 November 2003, available at www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/(2003-11)%20Business%20and%20Human%20Rights%20Draft%20Norms%20joint%20statement.pdf. Some states were also critical within the Commission: See Bair, *supra* note 18, at 164.

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> consensus and cooperation among business, civil society, governments and international institutions with respect to human rights.[35]

Thus, corporate opposition played a key role in prompting the SRSG to chart a path separate from the Norms, towards one which was much more palatable to business.

Ruggie's first mandate concluded with the presentation of the protect/respect/remedy framework for corporate human rights accountability.[36] This framework eventually formed the 'three pillars' for the UN Guiding Principles (UNGPs), which were formulated by the SRSG and endorsed by the Human Rights Council at the conclusion of his mandate in 2011.[37]

In the UNGPs, the three pillars are operationalized by 31 principles, each with associated commentary. Pillar One is the state duty to protect, that is the duty of states to protect third parties from the actions of business. This was and is a binding principle in international law, discussed further in Section 3.

Pillar Two is the most innovative aspect of the UNGPs. This is the pillar that tells corporations what to do, as opposed to Pillar One which tells states what to do about corporations. It outlines a corporate responsibility to respect human rights, that is a responsibility to 'do no harm' to the enjoyment of human rights. The main strategy prescribed by the UNGPs for businesses to satisfy this responsibility is for them to undertake effective due diligence processes to identify, prevent and mitigate their detrimental human rights impacts.[38] The SRSG explicitly divorced Pillar Two from law, saying its basis lay in the social rather than legal expectations of business.[39] This means that Pillar Two has a broader application, as social expectations can extend far beyond legal baselines, especially in the many states where corporate regulation is underdeveloped. But it also has a shallower application, as it is clearly not binding, and even 'not-law'.[40] It is a markedly softer approach than that of the Norms, which were plotting a path towards both negative and positive hard direct obligations.

Pillar Three dictates that victims of business-related human rights abuses have access to a remedy. This Pillar is aimed at both states, who are able to provide judicial and administrative remedies, and corporations, who may provide informal in-house remedies. Pillar Three is embedded in the other two pillars, as the provision of remedies to victims is clearly an aspect of state duties under Pillar One, given the independent existence of a right to a remedy for human rights abuses, and corporate responsibilities under Pillar Two.

Numerous BHR initiatives have also emerged at the international level from outside the UN over the years. It suffices to note that they constitute soft law in terms of being non-binding, though some, such as the OECD Guidelines on Multinational Enterprises, are some way along the spectrum towards harder obligations.[41]

The UNGPs are the leading international BHR instrument. They now underpin other BHR initiatives, including revisions of the OECD Guidelines and the International Labour

[35]Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E.CN.4/2006/97 (2006), para. 69. Note that Ruggie had described the Norms as a 'trainwreck' which he declared 'dead': See Nolan, *supra* note 14, at 150, note 48.

[36]UNHRC, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (2008).

[37]UNHRC, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (2011), available at www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (UNGPs).

[38]Ibid., principle 15.

[39]See UNHRC, *supra* note 36, para. 54; see Choudhury, *supra* note 14, at 968.

[40]See Nolan, *supra* note 14, at 155.

[41]See Choudhury, *supra* note 14, at 967; this is due to the precision within the OECD standards, and the delegation of the resolution of disputes to National Contact Points within OECD countries: see text at note 89, *infra*.

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Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[42] as well as numerous national action plans, voluntary policies and self-governing codes for industries and single corporations. Their operationalization is led by the UN Working Group on Business and Human Rights, which was created by the UN Human Rights Council in 2011 as a replacement for the Ruggie mandate.[43]

Given the consensus reception of the UNGPs in 2011, it was perhaps a surprise that a new proposal for a binding hard law instrument was adopted by a majority in the UN Human Rights Council in 2014.[44] The proposal, initiated by Ecuador and supported by most developing states on the Council, called for renewed efforts towards a BHR treaty. The proposal was rejected at the time by all developed states on the Council.[45]

An Open-Ended Intergovernmental Working Group (OEIWG) has been established to draft the instrument.[46] It produced a 'zero draft' in 2018, and three more iterations have thus far ensued.[47] The 'treaty' process is unambiguously signposting towards significant hard law in the BHR area, so it is probably the 'hardest' in ultimate intention of all strategies pursued so far. Its proposed content as at August 2022 is discussed in Section 5.

3. Hard international law in the BHR space

3.1 The need for hard international law

The UNGPs are the dominant international BHR instrument, so soft law currently predominates. So, in the decade since their adoption, have they been successful in reducing BHR abuses?

In 2014, Ruggie identified numerous instances of engagement with the UNGPs by governments, industry groups, companies, intergovernmental organizations, trade unions and civil society. They had generated an extraordinary amount of activity in a short time,[48] which will have only grown in the years since. However, activity is not the same as progress. Regarding the latter, it is very difficult to measure and assess progress across the millions of companies and multinationals in the world. One relevant instrument, the Corporate Human Rights Benchmark[49] reported some progress in 2020 compared to 2019, yet it added the following:

> only a minority of companies demonstrate the willingness and commitment to take human rights seriously. The second challenge is arguably more pernicious and relates to the disconnect between commitments and processes on the one hand and actual performance and results on the other.[50]

[42]International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2017).

[43]Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/17/4 (2011).

[44]Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/26/L.22/Rev.1 (2014).

[45]O. De Schutter, 'Toward a New Treaty on Business and Human Rights', (2015) 1 *Business and Human Rights Journal* 41, at 41–2

[46]See UNHRC, *supra* note 44.

[47]See www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (Zero Draft); see www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (Revised Draft – 2019); see www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (Second Revised Draft, 2020); see www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf (Third Revised Draft, 2021).

[48]J. Ruggie, 'The Past as Prologue: A Moment of Truth for UN Business and Human Rights Treaty', *Institute for Business and Human Rights*, 8 July 2014, available at www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre.

[49]See its methodology at www.worldbenchmarkingalliance.org/publication/chrb/methodology/.

[50]World Benchmarking Alliance, 'Corporate Human Rights Benchmark', available at www.worldbenchmarkingalliance.org/publication/chrb/.

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Furthermore, a 2020 report commissioned by the European Commission on human rights due diligence requirements for companies was highly sceptical of compliance outcomes for soft law instruments:

> [S]oft law instruments ... do not give rise to legally binding obligations. As a result, despite the influence of the UNGPs, the actual implementation of due diligence obligations for human rights and environmental impacts by businesses has been very poor in practice.[51]

In its 2022 report, the Corporate Human Rights Benchmark reported that a majority of companies had improved their human rights performance since inclusion in the benchmark in 2017, though the rate of improvement was 'slow'.[52]

Digression from soft law norms by companies attracts attention from civil society and media, and therefore a degree of shame and brand damage.[53] To date, however, soft law does not seem to have incentivized radical breaks with past patterns of business which undermine human rights. Digressions from hard law would presumably generate more shame, as the company would be a 'breaker' of international law. While it cannot be assured that hard law would incentivize better behaviour, such a conclusion seems fair. Indeed, the 2022 Corporate Human Rights Benchmark Report states that '[r]egulatory action could provide the much-needed push for companies to move more rapidly towards respecting the human rights of all affected stakeholders'.[54] We return to this issue in Section 6.

In any case, despite the prevalence of soft law, relevant hard international law indeed exists. It is to these developments that we now turn in this section and the next.

3.2 The state duty to protect

While the UNGPs are soft law, they restate an important element of international hard law, the state duty to protect in Pillar One, that is the duty that all states have to protect their people from third parties, including businesses.[55] States are not responsible for all human rights harms inflicted by private organizations within their territory, but they are required to exercise due diligence by taking reasonable measures, such as the passage and enforcement of legislation, to address such harms. A state implements this hard law international duty by appropriately regulating the operations of businesses within jurisdiction, and enforcing such regulations, so as to prevent and punish activities which detrimentally affect the enjoyment of human rights. Hence, states are responsible for regulating multinational corporations when they host their operations.

3.2.1 Extraterritorial duty to protect

While the existence of the state duty to protect is now entrenched in international human rights law, there is debate over whether this duty extends to people outside a state's territory, an issue of great relevance given the transnational nature of much business activity. It is accepted that states are permitted to exercise extraterritorial jurisdiction over their own nationals: nationality-based jurisdiction is the second most common form of jurisdiction after the exercise of territorial

[51]European Commission, Directorate-General for Justice and Consumers, Torres-Cortés et al., *Study on Due Diligence Requirements through the Supply Chain: Final Report* (2020), 243. See generally, Part IV.

[52]'Corporate Human Rights Benchmark', 21 November 2022, available at www.worldbenchmarkingalliance.org/publication/chrb/.

[53]See Choudhury, *supra* note 14, at 977; see Abbott and Snidal, *supra* note 10, at 452; see Nolan, *supra* note 14, at 145.

[54]'2022 Corporate Human Rights Benchmark Report, Key Finding', available at www.worldbenchmarkingalliance.org/publication/chrb/findings/44461/.

[55]See, e.g., UN Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

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jurisdiction.[56] However, the existence of a state's *right* to exercise such jurisdiction does not equate with a relevant *duty* to do so. In this section, we will focus on the position under the UN Covenants, given they cover a great range of rights in states parties located all over the world.[57]

A conservative approach to the issue is taken in the UNGPs. Though extraterritorial regulation is encouraged, the commentary to Guiding Principle 2 opens with the following sentence:

> At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.[58]

In contrast, the UN Committee on Economic Social and Cultural Rights (CESCR), the body which monitors and supervises implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has constantly suggested that states have obligations to regulate the activities of their companies operating abroad. For example, in its General Comment 24 on Human Rights in the Context of Business Activities, it stated:

> The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.[59]

The UN Human Rights Committee (UNHRC), which supervises and monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), has been less forthright on extraterritorial duties to protect than its sister treaty body. However, it has recently moved closer to the position of the CESCR Committee. In General Comment 36 on Article 6, the right to life, it stated:

> [States] must take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, *including activities taken by corporate entities based in their territory or subject to their jurisdiction*, are consistent with article 6, *taking due account of related standards of corporate responsibility and of the right of victims to obtain an effective remedy*.[60]

In *Yassin et al.* v. *Canada*, an admissibility decision of the UNHRC issued a year prior to General Comment 36, a group of Palestinian villagers brought a claim against Canada regarding its failure, they claimed, to comply with its extraterritorial duty to protect[61] by appropriately regulating the actions of two companies registered in Quebec. For example, Canada had dismissed relevant court proceedings against the companies on procedural grounds. The two companies had been involved

[56]See, e.g., *Restatement (Third) of the Foreign Relations Law of the United States* (1987), Vol. 2, para. 402(2).

[57]We note that the treaty bodies established under the Covenants lack the power to make legally binding decisions. Their decisions are authoritative quasi-judicial interpretations of the Covenants, which are themselves legally binding.

[58]See UNGPs, *supra* note 37, commentary of Principle 2.

[59]UN Committee on Economic, Social and Cultural Rights, General Comment 24, E/C.12/GC/24 (2017), paras. 30–31. See also Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), available at www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf.

[60]UNHRC, General Comment 36, CCPR/C/GC/36 (2019), para. 22 (emphasis added).

[61]*Yassin et al. v. Canada*, UN Doc. CCPR/C/120/D/2285/2013 (7 December 2017). The complainants framed this in the language of Art. 2(1) of the ICCPR as the failure by Canada to 'ensure respect': see, e.g., *Yassin*, para 3.2, and an 'extraterritorial duty to guarantee' certain rights (para 3.5).

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in the construction of illegal settlements, and the marketing for sale of condominiums within those settlements, in the occupied West Bank. The complainants claimed breaches of their rights to freedom of movement, privacy, freedom from inhuman treatment, and minority rights.

The UNHRC stated, relevantly:

> [T]he Committee considers that there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction.[62]

Ultimately, the complaint was found to be inadmissible as the complainants had failed to furnish sufficient information on Canada's actual regulation and ability to control the two companies,[63] as well as the role played by the companies in settlement construction and the impact on the complainants.[64] Nevertheless, these recent jurisprudential developments indicate that the UNHRC is prepared, in a growing number of circumstances, to hold states accountable for failures to exercise appropriate due diligence with regard to the extraterritorial activities of home companies.

Finally, one may note that the third revised draft of the proposed legally binding instrument on BHR proposes an extraterritorial duty to protect, and its wording in fact assumes that such an obligation already exists.[65]

More evidence exists now of an existing duty for states to regulate the extraterritorial activities of their corporations with regard to human rights than when the UNGPs were adopted in 2011. As stated by Verdier and Stephan:

> Even if international law does not require [home states] to impose human rights responsibilities on corporate nationals, there is a growing expectation that they should.[66]

The issue of whether states have an extraterritorial duty to protect is crucial in the BHR debate. Multinational corporations often operate in multiple host states. While all states are required to regulate such corporations under their domestic laws as part of their duty to protect, various factors may prevent this from happening properly. Some states are corruptible, and may in fact be complicit in violations of rights by businesses.[67] Some states are economically vulnerable, so they may be reluctant to regulate certain companies and risk them taking their investment elsewhere. And some states may lack the legal infrastructure to manage complex litigation involving many complainants against a corporate group. Furthermore, as noted in our introduction, multinational corporations are able to practically limit liabilities through the way they structure their operations and distribute assets. Therefore, there are many reasons why sole reliance on host states can lead to corporate impunity.

The growth in home state regulatory measures, be it via domestic legislation over global supply chains or through the judicialization of corporate extraterritorial human rights duties (discussed below), have therefore been largely lauded as a positive development in facilitating victims' access to remedies. There are, however, risks in constructing the growth of 'delocalized justice' in the BHR sphere, namely, the 'transfer of the site of justice away from the community where harm was suffered', as an '... unmitigated good', particularly where such a transfer occurs from the

[62]Ibid., para. 6.5.

[63]It may be noted that the only link between the companies and Canada was the fact of incorporation: they had no apparent physical presence, activity or assets in Canada: ibid., para. 4.6.

[64]Ibid., paras. 6.7–6.8

[65]See Third Revised Draft, *supra* note 47, Art. 2(1)(a).

[66]P. Verdier and P. Stephan, 'International Human Rights and Multinational Corporations: an FCPA Approach', (2021) 101 *Boston University Law Review* 1359, at 1365.

[67]Indeed, where joint abuses arise, it is often the state that has engaged in the worse behaviour.

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Global South to the Global North.[68] The extraterritorial exercise of laws in the Global North over corporations may form part of 'an imperialist approach which portrays, on the one hand, developing countries as unable to provide remedies to victims, and on the other, developed judicial systems as the saviours of the third world', whilst 'perpetuating the underdevelopment of judicial systems in the Global South that become increasingly unwilling or unable to address the problems their population face'; such approaches also put 'aside the structural injustices and inequalities of the global economy'.[69] It is thus important to remain critical of an unreflective view of extraterritorialization as 'some kind of natural fulfilment of the telos of human rights as a cosmopolitan constitutional law for all humanity'.[70]

Having said this, it is generally victims who file extraterritorial human rights claims, sometimes with the support of their states, in their efforts to obtain recognition of their interests and remedy for harms suffered;[71] this presses against a simplistic assessment of extraterritorialization as implicitly imperialist in nature.[72]

Ultimately, much may depend on the way in which domestic extraterritorial laws of home states are developed and enforced. For example, Lichuma has argued that the development of domestic extraterritorial rules pursuant to international agreement may be preferable from a TWAIL (Third World Approaches to International Law) perspective to counter the potential for such laws to reinforce a neo-colonial agenda. This is because the process of securing international agreement serves to preserve the sovereign equality of states and to ensure that host states maintain a seat at the table.[73] These ideas reinforce the importance of current efforts towards a treaty on business and human rights, discussed in Section 5 below.

Regardless of their current legal status, and this broader normative debate, there are increasing examples of states imposing or enforcing hard law measures against their own companies with regard to extraterritorial activities and outcomes which harm human rights. Some of these are discussed in Section 4 and some others in the other articles in this symposium.

3.3 Corporate obligations under international criminal law

Beyond the duty of states to regulate corporations, it is arguable that corporations have existing direct and binding obligations under international criminal law.[74] International criminal law disrupts international law's traditional state-centrism by placing the individual and the international community at its centre. This includes positioning individuals as a primary subject of duties. While some take the view that the scope of international criminal law is limited to natural persons (including business persons like company directors but not the corporate entity),[75] others argue

[68]A. Duval and M. Plagis, 'Delocalized Justice: The Delocalization of Corporate Accountability for Human Rights Violations Originating in Africa', (2021) *Afronomics Law*, Symposium Post.

[69]D. Palombo, 'Business and Human Rights Symposium: Rejecting Jurisdiction to Avoid Imperialism – That Simple?', *OpinioJuris*, 25 June 2021.

[70]Ibid.

[71]S. Joseph and B. Sander, 'Scope of Application', in D. Moeckli et al. (eds.), *International Human Rights Law* (2022), at 127.

[72]See Palombo, *supra* note 69. See also S. L. Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?', (2008) 46 *Osgoode Hall Law Journal* 565.

[73]C. O. Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains', (2021) 81(2) *Heidelberg Journal of International Law* 497, at 515–21.

[74]Some go further and argue that a wider set of international human rights norms impose binding obligations on corporations directly under international law: see, e.g., A. F. L. Latorre, 'In Defence of Direct Obligations for Businesses under International Human Rights Law', (2020) 5 *Business and Human Rights Journal* 56.

[75]See, e.g., *Presbyterian Church of Sudan v. Talisman Energy Inc*, Brief of Amici Curiae Professor James Crawford in Support of Conditional Cross Petitioner, 23 June 2010; *Kiobel v. Royal Dutch Petroleum*, 621 F 3d 111, 132–6 (Cabranes J) (2nd Cir, 2010). See also J. G. Ku, 'The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking', (2011) 51 *Virginia Journal of International Law* 353, 377–89; M. Karavias, *Corporate Obligations under International Law* (2013), 89–115.

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that its core prohibitory norms bind all social actors, including corporations.[76] This is notwithstanding that most (but not all) international criminal institutions to date have had jurisdiction limited to natural persons.[77] Indeed, states have at times been explicit that inferences should not be drawn against the existence of corporate duties under international law based upon their decision to limit the jurisdiction of international criminal institutions to natural persons.[78] Among other arguments, this position is built upon the status of international crimes as peremptory customary international norms directed at both state and non-state actors. Moreover, the complex and fragmented structure of international criminal law is such that it is reasonable to talk about persons being bound in terms of a prohibition against certain conduct, whilst simultaneously not being subject to an international liability regime or adjudicative forums in the event of a breach.[79]

Nevertheless, the existence of such customary duties remains contentious. To some extent, the question of whether corporations have duties under international criminal law is often moot as most international or domestic institutions that enforce international criminal law do so pursuant to legislative fiat, which sets out the court or tribunal's personal adjudicative jurisdiction.[80] Moreover, unlike the public international law obligation of states to prosecute or extradite individuals who are believed to have committed serious international crimes,[81] there is no suggestion that a like obligation attaches to corporate offenders, not least because a corporation cannot be extradited.

The issue is nonetheless important. For example, in some states, domestic laws provide pathways for human rights enforcement where a norm binds an actor directly under customary international law. Examples have arisen in Canada,[82] France,[83] and the US,[84] where corporate civil liability for abuses is contingent on the status of corporate duties under customary international law.

4. Domestic translation of the duty to protect

The Pillar One duty for states to protect human rights from businesses, which effectively restates an aspect of existing international human rights law, requires states to appropriately regulate and hold businesses to account under their domestic law. As discussed, that duty may now extend to extraterritorial regulation.[85]

[76]Summarising the arguments see J. Kyriakakis, *Corporations, Accountability and International Criminal Law: Industry and Atrocity* (2021), 77–83, 237–42.

[77]Experts have noted that both the International Military Tribunal at Nuremberg and the Special Court for Sierra Leone had jurisdiction to hear cases against corporations, though this was never tested by prosecutors. See J. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said', (2009) 109(5) *Columbia Law Review* 1094, at 1115, 1149–57, 1176–8, 1198–1200 (on the proposal to indict corporations at Nuremberg); W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006), 139 (on the Statute of the Special Court for Sierra Leone).

[78]See, e.g., Kyriakakis, *supra* note 76, at 106–17, 135–6 (on interpretations of the legislative history of the Rome Statute of the International Criminal Court).

[79]V. Nerlich, 'Core Crimes and Transnational Business', (2010) 8(3) *Journal of International Criminal Justice* 895, at 898–9; A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), 267.

[80]J. G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', (2014) 47 *New York University Journal of International Law and Politics* 121, at 163–70.

[81]R. Cryer, D. Robinson and S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (2019), at 74–8.

[82]See, e.g., *Nevsun Resources Ltd v. Araya et al.*, 2020 SCC 5 (Supreme Court of Canada). See also the contribution of Penelope Simons in this issue at doi:10.1017/S0922156522000784.

[83]See, e.g., *Association France-Palestine Solidarité 'AFPS' v. Société ALSTOM Transport SA*, Case No. 11/05331, 22 May 2013 (Versailles Court of Appeal, France).

[84]This question has dominated, for example, in the context of Alien Tort Statute corporate litigation: see, e.g., D. Prince, 'Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?', (2011) 8 *Seton Hall Circuit Review* 43.

[85]See also UN Committee on the Rights of the Child, General Comment 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights, UN Doc. CRC/C/GC/16 (2013), paras. 38–46.

In contrast, (potential) corporate duties under international criminal law are not accompanied by state duties to prosecute or extradite companies for such crimes. Nor, for that matter, is there currently an international institution with jurisdiction over corporations.[86] While states do have duties to hold companies to account for such crimes as part of their general duty to protect human rights, that does not necessarily equate with a duty for states to do so under their criminal law as opposed to other types of domestic law.

As there continues to be no dedicated international or supranational institution with competence to consider corporate breaches of human rights, relevant hard international BHR obligations require translation into the domestic law of states. In this part, we examine prominent examples of how states have done so.

The array of domestic approaches to BHR is so multitudinous that a comprehensive survey is beyond the scope of this article and indeed this symposium. Hence, we restrict ourselves here to prominent influential examples. We do not take up the jurisprudence emerging from a recent spate of climate change related litigation, except to note it signals growing expectations grounded in hard law that both states[87] and carbon emitting corporations[88] must take steps reduce their emissions.

States implement the duty to protect through their executive, legislative and judicial branches. We look at examples of all three below.

4.1 Executive branch

Strategies which focus on the executive branch, including government bureaucracies and bespoke statutory institutions, are essentially soft domestic law. For example, National Contact Points are established domestically pursuant to the OECD Guidelines. One of their roles is to mediate and conciliate between parties involved in allegations of non-observance of the Guidelines, and make public recommendations on the way forward. However, they cannot make binding decisions regarding allegations of corporate misbehaviour.[89] National human rights institutions, which normally have only soft advisory powers, may also play a role in addressing BHR issues.[90] Another such mechanism is the new Canadian Ombudsperson for Responsible Enterprise, discussed in the contribution by Penelope Simons to this symposium.

The most common example of such 'executive approaches' is the widespread adoption of National Action Plans (NAPs) on BHR. Such a strategy is encouraged by Principle 8 of the UNGPs, which urges policy coherence on BHR across all of government. The UN Working Group on Business and Human Rights strongly recommends the adoption of NAPs, and has provided guidance on the process for their adoption and their content.[91] NAPs have been adopted by dozens of states since 2011 to signal their policy commitment to the UNGPs across government, to engage in appropriate dialogue with their corporate sectors and other BHR stakeholders, and to identify areas of disjointed government and regulatory gaps. The NAP strategy has proven

[86]A proposed African Criminal Court would have authority to hear cases against corporations should it come into force. For a discussion of the competence of the proposed African Criminal Court over corporations see J. Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court', in C. C. Jalloh et al. (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (2019), 793.

[87]See, e.g., *Urgenda Foundation v. The State of the Netherlands* (The Hague District Court, 24 June 2015) ECLI:NL:RBDHA:2015:7196 (original language: ECLI:NL:RBDHA:2015:7145).

[88]See, e.g., *Milieudefensie et al. v. Royal Dutch Shell* (The Hague District Court, 26 May 2021) ECLI:NL:RBDHA:2021:5339 (original language: ECLI:NL:RBDHA:2021:5337).

[89]Organisation for Economic Co-operation and Development, 'How Do NCPs Handle Cases?', available at mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm.

[90]As an example of action by a national human rights institution, see Commission on Human Rights of the Philippines, 'National Inquiry on Climate Change Report', 3 May 2022, available at chr.gov.ph/nicc-2/.

[91]UN Working Group on Business and Human Rights, *Guidance on National Action Plans* (2016).

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unusually popular: 42 BHR NAPs were adopted in the decade from 2011, compared to only 39 general human rights NAPs adopted in the longer period of time between 1993 and 2021.[92]

A recent study of NAPs noted that few identified indicators with which progress towards implementation could be measured,[93] so it is difficult and perhaps premature to measure their effectiveness. It is arguable that they 'constitute a detour from what states and companies really need to do in order to identify, prevent and/or mitigate negative human rights impacts'.[94] Certainly, UN human rights treaty bodies are sceptical over their utility, and have generally recommended that NAPs be supplemented as soon as possible by hard law domestic frameworks.[95] NAPs may assist in the implementation of the duty to protect, but their soft nature cannot of itself satisfy that obligation, especially as they provide no access to remedy.[96]

Cantú Rivera has said that NAPs should only be 'the very first step in an otherwise large-scale [BHR] project requiring constant updating'.[97] NAPs have been most common in Europe, where there has been a great increase in hard law domestic initiatives in the last few years, as explained directly below, so it may be that European countries have used their NAPs in the way recommended by Cantú Rivera.

4.2 Legislative branch

Despite the state's duty to protect, we are unaware of any domestic law which simply requires that companies respect internationally recognized human rights, though both Australian and United Kingdom (UK) law reform bodies have recently explored the possibility of introducing a corporate offence of failure to prevent serious human rights abuses in extraterritorial business operations.[98] Rather, relevant substantive human rights requirements for businesses can be extracted from a wide range of domestic laws and regulations, such as those concerning environmental protection, pollution, labour rights, privacy, data protection, occupation health and safety, consumer protection, trade practices, corporations, crime, and torts.

A number of jurisdictions impose requirements on businesses to report on their human rights impacts within their global supply chains, or on their impacts within a certain area of human rights. Examples include Modern Slavery Acts in the UK[99] and Australia,[100] the EU's Non-Financial Reporting Directive,[101] and the California Transparency in Supply Chains Act 2010. There are also requirements from various stock exchanges for human rights reporting from listed companies, such as on the stock exchanges for Malaysia, Indonesia, Thailand, Sao Paolo, and Johannesburg.[102] Such reporting laws generally relate to business activities within and outside the state's jurisdiction, including engagement with sub-contractors. Therefore, these laws have a significant extraterritorial component.

[92]C. M. O'Brien, J. Ferguson and M. McVey, 'National Action Plans on Business and Human Rights: An Experimentalist Governance Analysis', (2021) *Human Rights Review* 1, at 2.

[93]Ibid., at 17.

[94]H. C. Rivera, 'National Action Plans on Business and Human Rights: Progress or Mirage?', (2019) 4 *Business and Human Rights Journal* 213, at 236.

[95]Ibid., at 236, note 94.

[96]As explained above, Pillar Three addresses access to remedy, but access to remedy is also an aspect of Pillar One: it is not possible for a state to properly protect human rights without providing remedies.

[97]See Rivera, *supra* note 94, at 236.

[98]Australian Law Reform Commission, Corporate Criminal Responsibility – Final Report, ALRC Report 136 (April 2020), Chapter 10; Law Commission, Corporate Criminal Liability – An Options Paper (10 June 2022) (UK).

[99]Modern Slavery Act 2015 (UK).

[100]Modern Slavery Act 2018 (Cth); Modern Slavery Act 2018 (NSW).

[101]See, e.g., EU Non-Financial Reporting Directive: Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups Text with EEA Relevance, *OJ L 330, 15.11.2014, p. 1–9* (NFRD)

[102]DLA Piper, 'Human Rights Reporting', March 2016, available at www.dlapiper.com/da/morocco/focus/human-rights-reporting/.

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The thinking behind reporting laws is that compulsory transparency will lead a business to improve its performance on the matters they have to be transparent about. Reporting initiatives, and their relative weakness, are discussed in Charlotte Villiers' contribution to this symposium. Of themselves, reporting laws are reliant on consequences indirectly accruing from negative media, consumer boycotts, investor pressure, and particularly civil society.[103] These laws represent, at best, partial fulfilment of UNGP 3, where states should 'encourage, and where appropriate require' business enterprises to communicate how they address human rights impacts'. However, they do not represent fulfilment per se of the state duty to protect as they contain no formal enforcement mechanisms against companies for harming the enjoyment of human rights. Furthermore, some examples, such as the Modern Slavery Acts, only relate to a portion of human rights, rather than all of them.

A more recent phenomenon has been the appearance of 'mandatory due diligence' laws on the European continent, starting with the French Duty of Vigilance law, with similar laws now adopted in Germany, the Netherlands, Norway, and Switzerland. Such laws are arguably a response to the UNGPs, which would mean that international soft law has prompted domestic hard law.[104] However, it is also possible that such laws are being adopted in the shadow of the proposed treaty.[105] The advent of 'hard law' due diligence requirements is analysed by Surya Deva in this symposium.[106] Suffice to say here that while such legislation may be an important preventative measure, it runs the risk of focusing too much on processes and means, rather than on substantive BHR ends such as ensuring that businesses respect human rights and that affected rights holders have access to effective remedy.

4.3 Courts: Domestic judicialization of human rights

Hard domestic law is effectively comprised of legislative prescription and, where necessary, judicial enforcement thereof, plus judicial prescription via the common law in common law countries. Some of the most consequential examples of states imposing human rights obligations on companies have come through court decisions, and innovations by the judicial branch, as explained below. Indeed, courts are crucial to fulfilment by the state of Pillar Three, and also of Pillar One: human rights cannot be properly protected without remedies.

As noted, states have duties to protect people from corporate harms within their own territories. Furthermore, courts and tribunals generally have jurisdiction over matters arising within their states' territories. There are numerous examples of such cases against businesses, including against multinational businesses, in many countries. For example, Nigerian authorities brought civil claims against drug giant Pfizer in 2009 regarding a botched trial in 1996 of an experimental meningitis drug which the authorities claim caused deaths and serious injuries in children.[107] Pfizer settled the suits in 2009 for US$75 million, with final payment completed in 2014.[108]

[103]See L. K. E. Hsin et al., *Effectiveness of Section 54 of the Modern Slavery Act 2015: Evidence and Comparative Analysis* (2021), 24.

[104]S. Ratner, 'Introduction to the Symposium on Soft and Hard Law on Business and HR', (2020) 114 *AJIL Unbound* 163, at 163–4.

[105]Draft Art. 6.3 calls for states parties to adopt laws which compel companies to undertake appropriate human rights due diligence processes, the minimum content of which is prescribed in Art. 6.4 (see Third Revised Draft, *supra* note 47). See also R. Subasinghe, 'A Neatly Engineered Stalemate: A Review of the Sixth Session of Negotiations on a Treaty on Business and Human Rights', (2021) *Business and HR Journal* 1, at 8.

[106]See also S. Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface', (2021) *Business and HR Journal* 1, at 5–6.

[107]*Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169–70.

[108]For a timeline and outcomes of the litigation see Business and Human Rights Law Resource Centre, 'Pfizer Lawsuit (re Administration of Experimental Drug in Nigeria, filed in Nigeria', available at www.business-humanrights.org/en/latest-news/pfizer-lawsuit-re-administration-of-experimental-drug-in-nigeria-filed-in-nigeria/.

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After territorial jurisdiction, the next most common basis of jurisdiction is nationality: courts in many states have extraterritorial jurisdiction over the acts of their states' nationals, including corporate citizens.[109] While debate remains over the extent to which states have a duty to regulate extraterritorial corporate activities, it is generally accepted that a state may choose to do so, and many have done so. In fact, it is in this space that some of the most celebrated recent developments in the hardening of BHR have occurred.

4.3.1 The English tort cases: Parent company liability

The most consequential developments in recent years have arisen in England, where the corporate veil has been bypassed rather than pierced in a series of tort (negligence) cases brought against parent companies for human rights violations linked to the overseas operations of subsidiaries. In *Chandler* v. *Cape Plc*, the House of Lords found that a parent company could be held liable in negligence for its failure to properly advise its subsidiary on appropriate health and safety standards for workers. The duty of care was owed by the parent corporation to the employees of its subsidiary because the subsidiary had inherited an inherently unsafe system of work from the parent company and the parent company had the superior knowledge of the risks and how to respond to them, and knowledge of the subsidiaries' reliance upon it.[110]

More significant was the 2019 decision of the Supreme Court in *Vedanta Resources Plc* v. *Lungowe*.[111] There was some possibility that *Chandler* might have been read restrictively, as setting out a limited and exceptional basis for a parent company's duty of care in the context of the parent/subsidiary relationship. *Vedanta*, however, confirmed that ordinary principles of torts law apply to determine the question of a duty of care on the part of parent companies to individuals impacted by the activities of their subsidiaries, rather than any exceptional set of principles. *Vedanta* concerned a claim by 2577 members of a Zambian farming community, whose health and livelihoods had been harmed by toxic wastes spilled into the source of their water by the Nchanga Copper Mine, a Vedanta subsidiary. The Court found that the British parent company, Vedanta, could be held liable for its failure to properly advise its subsidiary regarding its disposal of waste. Importantly, despite the shibboleth of separate legal personality, there was 'nothing special or conclusive about the bare parent/subsidiary relationship' which prevented findings that the former had duties of care regarding the operations of the latter: 'it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all'.[112] The Court identified four non-exhaustive examples of circumstances in which such a duty might arise. They are: where the parent has in substance taken over or jointly manages the activity of the subsidiary in question; where the parent has given defective advice or generated defective group-wide policies which have been implemented as a matter of course; where the parent has taken active steps to ensure relevant policies are implemented by the subsidiary; and where the parent holds itself out in published materials as exercising a degree of control or supervision over the subsidiary, irrespective of whether it, in fact, does so.[113]

Vedanta was followed in *Okpabi* v. *Royal Dutch Shell*.[114] It thus seems to be settled law in England that, in a range of situations which are determined by ordinary tort law principles, parent companies can be liable for their failure to prevent or control the harmful activities of their subsidiaries, including those offshore, through a direct duty to persons impacted by the subsidiary's activities. This approach allows plaintiffs to reach into the resources of home

[109]J. Crawford, *Brownlie's Principles of Public International Law* (2019), 443–4.
[110]*Chandler v. Cape plc* [2012] EWCA Civ 525.
[111]*Vedanta & Another v. Lungowe & Others* [2019] UKSC 20.
[112]Ibid., para. 54.
[113]Ibid., paras. 51–53.
[114]*Okpabi v. Royal Dutch Shell* [2021] UKSC 3.

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companies for the purposes of compensation, and also provides a basis for grounding jurisdiction in home states.

The English parent company cases are already influencing decisions in other jurisdictions. In *Four Nigerian Farmers and Milieudefensie* v. *Shell*, the Dutch Court of Appeal relied upon *Vedanta* to find that Royal Dutch Shell had a duty of care to third parties to prevent the risk of oil leaks from pipelines located in Nigeria and managed by its subsidiary, Shell Nigeria, through ensuring the installation of a leak detection system.[115]

Moreover, a recent English decision has signalled how tort law may develop so as to make incursions into the contractual veil, or supply chains. In *Begum* v. *Maran*,[116] the Court of Appeal of England and Wales permitted a case brought by the widow of a Bangladeshi ship-worker to proceed against a British shipbroker. The ship-worker had fallen to his death while working on breaking up an oil tanker in Bangladesh's notorious 'ship-breaking' yards. The appellant shipbroker, Maran, had sold the oil tanker, for the purposes of its demolition, to a cash broker who on-sold it to the Bangladeshi shipyards for it to be broken up.[117]

The case concerns Maran's liability for the accident. For the purposes of this interim judgment, it was assumed that Maran knew, due to the price paid by the intermediary, that the ship would be broken up in Bangladesh, and that Maran knew of the dangerous working conditions in Bangladeshi shipyards, and therefore had a relevant duty of care to the deceased worker.[118] Moreover, Maran is argued to have had the capacity to arrange the sale of the ship in such a way as to render it more likely to be delivered to a safer shipyard for dismantling.[119] The case has a long way to travel, and the Court has recognized that, if demonstrated, a finding that such a duty of care existed would constitute an unusual extension of existing categories of negligence law.[120] Nonetheless, the case demonstrates the potential for hard law to develop which imposes an expectation, in certain circumstances, that businesses exercise greater vigilance with respect to known abuses within their supply chains and that they utilize their capacity to avoid those where it is open to them.

The English developments are crucial in truly implementing a duty to protect, including any duty in an extraterritorial context. They indirectly address some of the thorniest issues which arise in holding companies to account for human rights abuses, such as the corporate and contractual veils which can be manipulated to minimize accountability, as discussed in the article in this symposium from Charlotte Villiers. While few, the influential nature of these decisions has already been demonstrated in the Netherlands.

4.3.2 The demise of the Alien Tort Claims Act

While England may provide an example of positive developments in the implementation of the duty to protect, the US provides an opposing example.

Throughout the late 1990s and early twenty-first century, many cases were brought in US federal courts under the Alien Tort Claims Act 1789 (ATCA) concerning alleged gross violations of human rights by corporations in the US, and more often in other countries. US federal courts

[115] *Four Nigerian Farmers and Milieudefensie v. Shell* (The Hague Court of Appeal, 29 January 2021) ECLI:NL:GHDHA:2021:132 (original language: ECLI:NL:GHDHA:2021:132). The Dutch court decided the matter was governed by Nigerian law. Roorda has, however, demonstrated how the Dutch Court misinterpreted the English precedents in such a way as to restrict their implications: L. Roorda, 'Broken English: A Critique of the Dutch Court of Appeal decision in Four Nigerian Farmers and Milieudefensie v Shell', (2021) 12(1) *Transnational Legal Theory* 144–50, at 147–8.

[116] *Begum v. Maran* [2021] EWCA Civ 326.

[117] Ibid., paras. 5–14.

[118] Ibid., paras. 25–37.

[119] Ibid., paras. 67–70.

[120] Ibid., paras. 14, 37, 65.

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interpreted the statute as authorizing tort claims by aliens against companies with regard to acts, or complicity in acts 'committed in violation of the law of nations'.

However, successive decisions by the US Supreme Court have largely neutered ATCA as a basis for gaining a remedy for BHR abuse.[121] In *Kiobel* v. *Royal Dutch Petroleum*,[122] the Court held that ATCA presumptively had no extraterritorial reach. Hence, claims could only be sustained where the case's facts 'touch[ed] and concern[ed] the territory of the United States ... with sufficient force'.[123] Subsequently, a claim which actually touched and concerned US territory was dismissed in *Jesner* v. *Arab Bank*,[124] where the Supreme Court decided that foreign corporations could not be sued under ATCA.

Most recently, in *Nestle US* v. *Doe*,[125] the Supreme Court dismissed an ATCA claim concerning alleged complicity in child labour in Mali entailed, in part, by decisions made in boardrooms in the US. According to the majority, decision-making alone, even if it led to profound consequences, could not provide the necessary link to US territory to overcome the presumption against extraterritoriality.[126]

On a brighter note for victims, a separate majority agreed incorporation provided no special immunity and that ATCA claims could lie against US companies.[127] Thus, ATCA remains available for claims against US companies so long as significant actions or effects beyond decision-making occur in the US. It should not be too difficult for savvy companies to avoid liability where the harm occurs outside the US, by avoiding the perpetration of relevant actions inside the US.[128]

ATCA case law is now an example of a state, the US, moving in the opposite direction to both soft and hard international law.[129] This is a significant blow to the cause of victims seeking BHR remedies: in 2013 Jennifer Zerk compiled materials on BHR for the Office of the UN High Commissioner on Human Rights, and remarked frequently on how unique and important the ATCA was for victims of gross human rights abuses.[130] That unique and important remedy has now been largely eviscerated.

4.3.3 Perils of litigation

The domestic judicialization of BHR is not however without major problems in execution. Quite apart from the normative concerns critical scholars have raised regarding delocalized justice discussed earlier, there are major obstacles to the availability of remedies even in cases able to be pursued in the host state. In this respect, the tale of proceedings regarding Texaco/Chevron and environmental pollution in Ecuador (caused by Texaco's operations in the country between 1964 and 1992) is a cautionary one.[131]

In 2012, an Ecuadorian court found that Chevron, which had acquired Texaco in 2001, was liable to pay US$18 billion to a group of Indigenous plaintiffs from the Ecuadorian Amazon region

[121]See R. Chambers and J. Martin, 'United States: Potential Paths Forward after the Demise of the Alien Tort Statute', in E. Aristova and U. Grušic (eds.), *Civil Remedies and Human Rights in Flux* (2022), 351.

[122]*Kiobel v. Royal Dutch Petro. Co.*, 133 S Ct 1659 (2013).

[123]Ibid., at 1669.

[124]*Jesner v. Arab Bank*, 138 S Ct 1386 (2018).

[125]*Nestlé United States, Inc v. Doe*, 141 S Ct 1931 (2021).

[126]Ibid., at 1937.

[127]Ibid., at 1940–1.

[128]See, generally, D. LeClerq, 'Nestle United States v. Doe: 141 S Ct. 1931', (2021) 115 *American Journal of International Law* 694.

[129]It may be noted that such retrogression is not a breach of the ICESCR, as the US is not a party to it. Under the principles outlined in General Comment 36 and the *Yassin* case, such developments might breach the ICCPR.

[130]J. Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies', commissioned by the OHCHR, May 2013, at 53, 89, 94.

[131]Much of the chronology of the case is taken from S. Joseph, 'Protracted Lawfare: The Tale of Chevron Texaco in the Amazon', (2012) 3 *Journal of Human Rights and the Environment* 70.

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for environmental pollution in their homelands. On appeal, the judgment was confirmed but damages were reduced to US$9 billion.

The Ecuadorian judgment has not been satisfied. Instead, Chevron has dismissed the judgment as illegitimate and fraudulent, and has counterattacked with extraordinary force and success. It brought international investment proceedings against Ecuador, where an investment arbitral panel found that the judgment was induced by corruption, and that Ecuador was in breach of duties of fair and equitable treatment towards Chevron.[132] It has also brought proceedings in New York against US citizen and resident Steven Donziger, one of the plaintiff lawyers, for allegedly using corrupt means to obtain the judgment; Donziger denies the allegation.[133] Meanwhile, as Chevron lacks assets in Ecuador, the plaintiffs have sought relief in other countries without success.[134]

The *Chevron* case demonstrates the extraordinary difficulties that can arise in attempting to hold a powerful multinational corporation to account for human rights abuses. There is no doubt that devastating pollution has been inflicted in Ecuador upon the plaintiffs' land by a consortium including Texaco, affecting their livelihoods and health. Justice in that respect was first sought in Texaco's home country in the early 1990s, only for the cases to be punted back to Ecuador on the basis that it was a more appropriate forum.[135] The victims had argued, unsuccessfully, that Ecuador was an inappropriate forum due to its corrupt judiciary.[136] Ironically, the Ecuador proceedings have now been deemed to be corrupt by an international arbitral panel and by courts in New York (in failed proceedings to enforce the Ecuadorian judgment).

The *Chevron* case also underscores the advantage of the availability of remedies for transnational human rights abuses in home states, as has arisen in English tort cases. It is harder for companies to attack and impugn decisions from English courts, with their centuries of independence and professionalism, than those of Ecuador with their thinner record of independence and fairness. Having said this, the preferential treatment of judgments from home state courts, located largely in the Global North, is problematic in reflecting ongoing neo-colonial assumptions, as discussed earlier.

In any case, despite the English successes, serious obstacles lie in that and other home jurisdictions too. These include the ability of plaintiffs, often from marginalized communities, to deal with language barriers, as well as the costs of litigation.[137] Even when cases are mounted, vast resources and time go into the preparation and litigation of cases such as *Vedanta* on preliminary points such as jurisdiction, parent company liability, contractor liability, and choice of law.[138]

[132]*Chevron and TexPet v. Republic of Ecuado*r, PCA Case No. 2009-23, Second Partial Award on Track II dated 20 August 2021.

[133]Donziger was held in house arrest for over two years on a criminal contempt charge due to his failure to hand over lawyer/client correspondence; his house arrest was found to breach international standards regarding arbitrary detention by the UN Working Group on Arbitrary Detention in September 2021: Working Group on Arbitrary Detention, Opinion 24/2-21 concerning Mr Steven Donziger (United States of America, UN Doc. A/HRC/WGAD/2021/24(2021).

[134]New York has refused to enforce the judgment as the court found it to likely be marred by corruption: S. Mufson, 'US Judge Rules for Chevron in Ecuador Pollution Case', *Washington Post*, 4 March 2014. Canada has refused to pierce Chevron's corporate veil (*Yaiguaje v. Chevron Corporation* [2017] ONSC 135 (Ontario Superior Court of Justice, Canada), while courts in Brazil and Argentina refused jurisdiction due to a lack of any territorial connection to the case (see G. C. B. Navarro, *A Comparative Analysis of International Enforcement Procedures in the Chevron Case* (MPIL Research Paper Series No. 2018-08, at 10–15 (Argentina) and 17–20 (Brazil)).

[135]See, e.g., *Aguinda v. Texaco*, 303 F 3d 470 (2nd Cirt, 2002).

[136]See Joseph, *supra* note 131, at 72–3.

[137]A. Salyzyn and P. Simons, 'Professional Responsibility and the Defence of Extractive Corporations in Transnational Human Rights and Environmental Litigation in Canadian Courts', (2021) 24 *Legal Ethics* 24, at 27.

[138]See, generally, R. Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective', (2021) 6 *Business Human Rights Journal* 255, at 269; E. Aristova, 'The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?', (2021) 6 *Business Human Rights Journal* 1, at 15–17.

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Defendant corporations with deep pockets can bring multiple procedural motions in what might seem like an effort to 'out-litigate' plaintiffs.[139] Such expensive and time-consuming legal wrangling exhausts and deters plaintiffs and lawyers. In that respect, one may note that the celebrated English cases have largely been brought by one firm, Leigh Day and Co in London. As an example of how protracted cases can be, a case against ExxonMobil, launched in 2001 in Washington DC regarding its alleged liability in the 1990s for the torture of villagers in Aceh by Indonesian military personnel hired to guard ExxonMobil facilities, may finally be heading to trial after over 20 years of preliminary arguments and associated appeals.[140]

In common law jurisdictions, such litigation may also become bogged in arguments regarding the application of the doctrine of *forum non conveniens* (FNC). Under this common law doctrine, a court may refuse to exercise jurisdiction to hear a case on the basis that a court in another country is a more appropriate forum. It is clearly relevant in transnational cases, as seen in the Texaco/Chevron saga discussed above. While FNC has not been available for claims against UK companies under European Union law,[141] the doctrine will likely return now that the UK has left the EU.[142] FNC also remains a major issue in other common law countries such as the US and Canada.[143]

Furthermore, above we have only addressed *preliminary* issues, without acknowledging the difficulties in establishing corporate liability on a substantive basis, which may involve intricate questions such as definitions of attribution, complicity, causation, and the ascertainment of evidence through complex processes of discovery.[144] The extent of the difficulties associated with the establishment of substantive liability are as yet under-explored, as most human rights cases against companies have settled if plaintiffs can make it through the thicket of preliminary objections.[145] Settlements may be good for plaintiffs, but they prevent the establishment of precedents to guide future behaviour and litigation.

The problems associated with the attainment of judicial remedies are acknowledged in the UNGPs in Principle 26, but the UNGPs fall short of demanding their solution.[146] The inaccessible and gruelling nature of such litigation practically ensures that legal accountability will arise in only a small number of cases, despite beneficial developments for victims such as those in English law. At best, one can hope that a few cases might create a compliance ripple amongst corporations to avoid liability.

5. The proposed treaty

We now turn our attention to the proposed legally binding instrument, which we will refer to as a proposed 'treaty'. In particular, we examine whether the treaty, as currently proposed, can 'fix' the problems just identified in Section 4 in terms of the implementation of the state duty to protect. We first turn our attention to the views of the SRSG during the time of his mandates, and the reasoning behind his rejection of a treaty as the way forward on BHR.

[139]See Salyzyn and Simons, *supra* note 137, at 26.

[140]A. Llewellyn, 'Indonesian ExxonMobil Accusers Get Day in Court after 21 Years', *Al Jazeera*, 27 July 2022, available at www.aljazeera.com/economy/2022/7/27/indonesian-exxonmobil-accusers-get-day-in-court-after-21-year-wai.

[141]*Owusu v. Jackson* C-281/02 [2005] ECR I-1383.

[142]See Meeran, *supra* note 138, at 260. The UK has applied to be a party to the Lugano Convention which facilitates jurisdiction and co-operation in cross-border European cases. If it succeeds, FNC would be unavailable in cases against European companies. However, the European Commission has recommended rejection of the UK application: Communication COM (2021) 222 final of the European Commission dated 4 May 2021.

[143]See the article by Penelope Simons, *supra* note 82.

[144]See Zerk, *supra* note 130, at 10.

[145]See Meeran, *supra* note 138, at 267–8.

[146]States should merely 'consider' ways of reducing barriers to justice, some of which are outlined in the Commentary to UNGP 26; see also S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles', in Deva and Bilchitz, *supra* note 14, at 78, 102.

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5.1 The SRSG's rejection of a treaty

At the conclusion of his first term as SRSG in 2008, Ruggie explained why he had eschewed the recommendation of a treaty. He felt that treaty-making would be 'painfully slow', might undermine 'more effective short term measures', and would be very difficult to enforce.[147] While he conceded in 2014, after the successful passage of the Ecuadorian resolution in favour of pursuing a treaty, that the UNGPs were 'never intended to foreclose other necessary or desirable future paths', he was hardly subtle in again warning against the treaty path:

> Will this latest attempt to impose binding international law obligations on transnational corporations turn out to be another instance of the classic dysfunction of doing the same thing over and over again and expecting a different result? ... as of now this latest treaty effort looks very much like a case of dysfunction redux.[148]

While considerable progress has been made in the drafting of the proposed instrument in the years since Ruggie's warning, he was correct that it is no simple task. He may prove to be correct that a functioning treaty may never materialize.

5.2 What sort of treaty?

In terms of the objects that a BHR treaty might pursue, there were a number of possibilities available. Those included imposing duties directly on corporations under international law; a framework treaty that defines general obligations of result while leaving it to states as to how those are achieved; clarifying the scope of states' duty to protect; and establishing mutual legal assistance to ensure victims can pursue effective remedies via state courts.[149] Ultimately, the current draft treaty attempts to canvass the last two of these objects. While Article 2(1)(b) of the third revised draft states that one of its purposes is to 'clarify and ensure respect and fulfilment of the human rights obligations of business enterprises', the current draft proposes binding international obligations for states only, rather than for businesses directly.

5.3 The third revised draft

The third revised draft of the treaty was released on 17 August 2021. We will refer to the draft Articles as 'Articles' and discuss them in the present tense, for ease of explanation. Of course, the text may change. Having said that, the language seems to be solidifying: there were few major changes between the second and third revised drafts.

According to the third revised draft, the corporate responsibility to respect is to be transformed into a domestic legal duty, enforced by laws in both the home and host states, and even in states with a lesser connection to the business in so much as there are business activities under its control. Thus, it prescribes an extraterritorial duty to protect which shall be secured by effective regulation,[150] and is in fact drafted as if such a duty already exists.[151]

As for the scope of such regulation, businesses must be required to 'prevent and mitigate human rights abuses throughout their business activities and relationships'.[152] Hence, states must ensure that businesses have responsibilities beyond their own activities extending to those with whom they do business, including sub-contractors and entities within supply chains.[153]

[147] J. Ruggie, 'Business and Human Rights: Treaty Road not Travelled', *Global Policy Forum*, 6 May 2008.
[148] See Ruggie, *supra* note 48.
[149] See, e.g., De Schutter, *supra* note 45.
[150] See Third Revised Draft, *supra* note 47, Art. 6(1).
[151] Ibid., Art. 2(1)(a).
[152] Ibid., Art. 6(2).
[153] Ibid., see also Art. 8(6).

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Thus, ground-breaking decisions such as *Vedanta* and *Begum* (bearing in mind the preliminary nature of the latter) are intended to become mainstream across states parties. Furthermore, the treaty calls for mandatory due diligence in Article 6(3).[154]

Legal liability is to be prescribed for businesses, as well as natural persons involved in businesses, with regard to 'human rights abuses that may arise from their own business activities, including those of a transnational character, or from their business relationships'.[155] There must be 'effective, proportionate and dissuasive criminal, civil or administrative sanctions'.[156] Under Article 8(8), states parties are obliged to provide for 'criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offenses under international human rights law', thus filling an apparent gap under international criminal law.

Importantly, in order to cut through the jurisdictional red tape commonly encountered in transnational cases, the treaty mandates broad adjudicative jurisdiction for domestic courts. The mandate canvasses territorial (including where only part of the relevant act/omission occurs in a state's territory) and nationality jurisdiction, as well as passive personality jurisdiction (home of the victim).[157] Further extensions of jurisdiction are set out in Articles 9.4 (where the claim is connected with another legitimate claim within the state) and 9.5 (where 'no other effective forum guaranteeing a fair judicial process is available, and the claim is connected to the state by way of the presence of the claimant on its territory, the presence of defendant assets, or the state being the site of a substantial activity of the defendant'). Hence, the treaty seeks to slam the door on most jurisdictional arguments in BHR court proceedings.

Under Article 9.3, 'courts vested with jurisdiction shall ... avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings'. Article 9.3 is a softer version of the previous draft, which had prohibited FNC dismissals. Wiggle room for the application of this common law doctrine, even if small, is thus restored in the latest draft in the form of the softer word 'avoid'. If maintained or enlarged, one can expect FNC battles in BHR cases to remain lengthy. Nevertheless, the application of such a principle, though weaker than earlier drafts, may still significantly alter the present status quo.

Article 12 provides for mutual legal assistance and international judicial co-operation between states parties, such as the facilitation of the provision of information and evidence, and relevant investigations.[158] Under Article 12.10, states parties must recognize and enforce the relevant judgments of other states parties so long as the judgment is enforceable in the latter party, and is not subject to appeal or review, subject only to formalities (which must not be unduly onerous). Article 12.10 is bolstered by Article 7.6, which requires states parties to provide for 'the prompt execution of national and foreign judgments or awards'. Having said this, Article 12.11 sets out limited reasons where a state is able to refuse execution of another state party's relevant judgment, including the circumstance where such execution is 'manifestly contrary to the *ordre public* of the State party in which recognition is sought'.[159] Furthermore, Article 12.12 exempts a state party from providing mutual assistance or legal co-operation where 'it is contrary to the applicable laws of the requested State party'.

Article 12 recognizes the need for international co-operation and assistance in holding multinational corporations with transnational operations to account. Applied to the Chevron example outlined earlier, it would, for example, render enforcement of the Ecuadorian judgment in other states much easier, though presumably there would still be scope for Chevron to argue that the decision was corruptly obtained.[160] In addition, Article 8.5 addresses the issue of

[154]Standards of due diligence are prescribed in ibid., Art. 6(4), including mandatory reporting in ibid., Art. 6(4)(e).
[155]Ibid., Art. 8(1).
[156]Ibid., Art. 8(3).
[157]Ibid., Art. 9(1).
[158]Ibid., Art. 12(3).
[159]Ibid., Art. 12.11(c).
[160]We are in no position to give an opinion on whether Chevron's claims of corruption are true, though we note that they were supported by an international arbitral tribunal.

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undercapitalization by demanding that states ensure that businesses 'establish and maintain financial security ... to cover claims of compensation', which might reduce the need for foreign courts to enforce a judgment. Such a provision would significantly reduce the ability of companies to allocate assets outside the jurisdictions where they might undertake the greatest human rights risks.[161]

In the form of its third revision, the treaty aims to build a web of accountability that ensures procedural (e.g., reporting, due diligence) and substantive accountability for businesses, underpinned by prescribed legislative requirements and, where relevant, common law, and the availability of judicial remedies in multiple forums, bolstered by mandated mutual assistance, including in enforcement. If implemented, it would go a significant way towards addressing the tribulations of domestic implementation of the duty to protect, including the need to provide accessible, workable and powerful remedies that might act as a genuine disincentive to corporate misbehaviour. The treaty also attempts to even out the playing field in litigation between victims and businesses, by including measures to guarantee legal aid to facilitate access to remedies,[162] measures to ameliorate the barriers posed by rules on costs,[163] and even the possibility of reversing the burden of proof 'where consistent with international' and domestic law.[164]

However, there will always be ambiguities in an international document which achieves any degree of international consensus, which would inevitably become the subject of extensive legal argumentation. As it stands, there is room to improve the drafting of various provisions to address examples of uncertainties that can already been anticipated. For example, when can FNC not be avoided? Is strict liability to be imposed for actions within a corporate group, or is the standard one of negligence?[165] The issue of parallel proceedings is not addressed: it seems to be resolved by reference to whichever court is able to first validly pronounce on a claim, which seems to invite an unseemly race to judgment.[166] The exceptions in Articles 12.11 and 12.12 to the execution of foreign judgments would likely be ferociously litigated. While the treaty may close off important avenues of avoiding accountability, there is always a danger of it being a 'whack-a-mole' exercise that moves the focus to new avenues of evasion and gruelling legal duels.

Furthermore, the treaty, in targeting states rather than companies, again relies on the power and will of states to control corporations, so it may again fail to tackle the fundamental problem of excessive corporate political and economic power. This issue is addressed in Section 6 below, to which we now turn.

6. Grappling with corporate power

Regardless of whether BHR regulatory efforts are soft or hard law in nature, their success in terms of curtailing negative corporate effects upon human rights depends in a large part on the degree to which they grapple with corporate power, including the ways in which such power may collude with the interests of states. Indeed, we opened this piece by referencing corporate power as the underlying theme which necessitated the BHR debate in the first place.

[161]However, such a provision would be of little use in proceedings in the *Chevron* case which concerned the acts of a company, Texaco, that had completed its operations in Educator and been absorbed into a company that has never had operations within Ecuador.

[162]See Third Revised Draft, *supra* note 47, Art. 4.2(f).

[163]Ibid., Art. 7.4.

[164]Ibid., Art. 7.5.

[165]C. Lopez, 'The Third Revised Draft of a Treaty on Business and Human Rights: Modest Steps Forward, but Much of the Same', *Opinio Juris*, 3 September 2021, available at opiniojuris.org/2021/09/03/the-third-revised-draft-of-a-treaty-on-business-and-human-rights-modest-steps-forward-but-much-of-the-same/.

[166]S. Joseph and M. Keyes, 'BHR Symposium: The Business and Human Rights Treaty and Private International Law', *Opinio Juris*, 9 September 2020, available at opiniojuris.org/2020/09/09/bhr-symposium-the-business-and-human-rights-treaty-and-private-international-law/.

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The earliest UN effort to address transnational business in the form of the UN Draft Code probably represents the high point in terms of grappling with corporate power. To adopt Birchall's analytical framework set out at in our introduction, this is because the Draft Code went well beyond addressing the ways in which corporations, as individual units, can directly exercise power over the human rights of individuals. It included clauses ostensibly directed at the ways in which corporations exercise power over the materialities upon which the enjoyment of rights is built, and over the institutions through which human rights are realised. Moreover, it did so in a framework that protected the privilege of the host state to preserve its social and economic policy space against the demands and interests of foreign investors. For example, the Code proposed to oblige corporations to engage in good faith renegotiations of contracts where necessary for the economic and social good of the host state, and to encourage corporate structures that would best enable corporations to contribute to the host state's economic and social development. It contained clauses on anti-corruption, anti-tax avoidance, product labelling, corporate transparency, environmental protection and rehabilitation.

The Draft Code was a creature of the NIEO, a program which fundamentally challenged the legacy of colonialism and capitalism, which was cast aside in the 1980s when neo-liberalism took hold to increase corporate power in the global economy; the grip of that ideology has remained dominant in the global economy since. The parts of the Code which challenged, fundamentally, corporate power in the global economic order have not returned in any of the initiatives that have followed.

The Norms were a less ambitious project than the Draft Code, focusing almost exclusively on regulating corporate power over individuals, in Birchall's terms.[167] While a section of the Norms focused on 'national sovereignty and human rights', it was short on detail.[168] Despite this comparable conservatism in the Norms, corporate opposition mobilized successfully to kill them off. The SRSG deemed it impossible to proceed in the face of such corporate hostility, leading to a situation where relevant international law was shaped by what those being regulated were willing to tolerate. The demise of the Norms and the very elevation of the UNGPs' soft law approach thus represented an example of an exercise of corporate power over governance institutions and discourse, to use Birchall's framework.

Turning to the UNGPs, their brazen softness placated businesses and some states, while civil society was less happy with the departure from the harder approach signalled by the Norms.[169] One of the greatest achievements of the mandate was the extent of corporate buy-in: 'achieving consensus was highly prized' by Ruggie throughout his mandate.[170] However, the important voices of victims were excluded from this consensus process,[171] while the views of civil society and human rights academics seem to have been accommodated far less than those of business in the construction of the UNGPs and their commentary.[172]

There is an unwarranted faith in the idea that the UNGPs will induce changes in behaviour that have not happened historically. Bilchitz goes further, arguing that the UNGPs took corporate accountability efforts backwards by consciously slowing down the progressive development of international law.[173] Moyn has gone so far as to say that the UNGPs offer 'collusive shelter to global corporate power'.[174] The UNGPs do little to push back against structurally embedded corporate human rights impunity, even though the SRSG was well aware of the governance gaps

[167]See Bair, *supra* note 18, at 167.

[168]Ibid., at 169.

[169]Ibid., at 165–6.

[170]See Nolan, *supra* note 14, at 142.

[171]See Deva, *supra* note 146, at 83–4.

[172]Ibid., at 85.

[173]D. Bilchitz, 'A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and Guiding Principles', in Deva and Bilchitz, *supra* note 14, at 116–17.

[174]S. Moyn, 'A Powerless Companion: Human Rights In The Age Of Neoliberalism', (2014) 77 *Law and Contemporary Problems* 147, at 162.

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which generate that impunity.[175] Unlike the Draft Code of Conduct or, to a lesser extent, the Norms, the UNGPs fail altogether to 'grapple with the relationship between capital and the state'.[176]

If nothing else, the SRSG seemed to presume a unidirectional relationship between the advancement of social and legal norms, assuming that the former must evolve in order for the latter to be effective.[177] However, while 'social change pulls the law ... the law pushes society'.[178] Indeed, a by-product of the UNGPs has been the mushrooming of a new industry of consultants advising business on how to conduct human rights due diligence, carrying with it the attendant risks that rights will be construed in accordance with business interests rather than those of victims.[179] This new normal presents risks in terms of corporate power over human rights discourse, with Deva describing the possibility that we are entering a new era in the BHR space, namely a shift from business *and* human rights into the business *of* human rights.[180]

Turning to the proposed treaty, how does it grapple with corporate power? While its continued state-centric approach might underplay the reality of corporate power, that reality could meet its match in the treaty's multi-state-centric approach, that is its focus on multiple states at once, including host, home and sometimes other states.[181] The potential malevolent use of corporate power is also implicitly acknowledged and partially addressed in the treaty. For example, Article 5 provides for rights of protection for victims and human rights defenders in the BHR arena, 'so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity' (Article 5.2). This provision acknowledges the very real dangers faced by human rights defenders in the BHR space.[182] The persuasive powers of the business lobby are somewhat addressed in Article 6.8, where states, in setting and implementing relevant policies and laws, shall 'act in a transparent manner and protect these from the influence of commercial and other vested interests of business enterprises'. However, the latter provision would not be easy to interpret. Restrictions on corporate lobbying raise implications regarding freedom of expression and legitimate participation in the political process: how much influence is too much influence?[183]

Considered broadly, in terms of Birchall's framework, the current draft of the treaty, like the Norms and UNGPs before it, focuses largely upon corporate power over the human rights of individuals. It seeks to make significant inroads in that regard by challenging the corporate form itself, by diminishing the legal protections afforded by the corporate and contractual veils. It thus tends to challenge the structural advantage transnational corporations enjoy by virtue of company law and its operation in the global market.[184] The treaty also seeks to diminish corporate power

[175]See P. Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights', (2012) 3(1) *Journal of Human Rights and the Environment* 5.

[176]See Bair, *supra* note 18, at 169.

[177]Making a similar point, see S. Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface', (2021) *Business and HR Journal* 1, at 3–4.

[178]A. Sifris, 'Lesbian Parenting in Australia: Demosprudence and Legal Change', in P. Gerber and A. Sifris (eds.), *Current Trends in the Regulation of Same-Sex Relationships* (2011), 15.

[179]See Deva, *supra* note 28, at 5–6.

[180]Ibid.

[181]See, e.g., S. Deva, 'The Sangam of Foreign Investment, Multinational Corporations and Human Rights: An Indian Perspective for a Developing Asia', (2004) *Sing JLS* 305 (arguing that states maximise their ability to control the flow and direction of FDI towards local interests by acting collectively).

[182]For a recent report on the issue, see UNHRC, The Guiding Principles on Business and Human Rights:

Guidance on Ensuring Respect for Human Rights Defenders. Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/47/39/Add.2 (2021), paras. 13–24.

[183]There may also be a concern that the exclusive focus on stemming undue *corporate* influence over state law may tend to bolster corporate claims for substantive rights protections, such as the right to freedom of expression, counter to its intended effect. For an analysis, and rejection, of this kind of critique as a basis for opposing the regulation of corporations under international law see Kyriakakis, *supra* note 76, at 244–9.

[184]See also the article by Charlotte Villiers, in this issue at doi:10.1017/S0922156522000632.

over domestic institutions by providing for sites of accountability from the institutions of multiple rather than single states, particularly courts. Regarding corporate power over materialities, Birchall noted that this depends on the definition of what might count as an actionable breach by a corporation of human rights under the treaty, thus linking to the definition of 'human rights'. While that term is defined broadly in the treaty,[185] it is unlikely to incorporate issues such as inadequate levels of corporate taxation or an overabundance of opportunities for tax avoidance.[186] Yet such matters are crucial in determining, for example, the resources available to states to fulfil human rights.

Most obviously, while the treaty remains in draft form, opportunities remain to water down or even eviscerate its provisions. Indeed, Ruggie's main argument against a treaty was the supposed impossibility of devising one which would attract sufficient agreement. While he may prove to be correct, it is an approach which concedes defeat on hard law without trying.[187] If so, that is an example of an extraordinarily successful exercise of power by businesses, in Birchall's terms, over BHR discourse and possible reform.

Nevertheless, as with the Norms, business opposition may doom the treaty project.[188] While business has engaged in the treaty-drafting process, it remains hostile to much of the current draft.[189] In terms of state support, Roorda has questioned whether states would be willing to accede to a treaty which carves out an exceptional system of private international law in relation to BHR claims.[190] It seems likely that key states, such as the US, will refuse to accede to the treaty as currently envisaged, even if it comes into being. Indeed, the US finally engaged with the process in late 2021, but only to recommend that the present path be abandoned in favour of a 'framework treaty' based on the UNGPs.[191] Any pivot away from the current treaty approach to a framework model may set back the process considerably, possibly leading to a loss of good faith engagement and morale from various sectors and states.

Despite potential shortcomings in the treaty, its successful conclusion and implementation remains crucial because international law is at present deeply imbalanced in the way it treats corporations. Hard BHR law, as discussed above, currently consists of the fractured and flawed ways in which individual states are implementing their duty to protect. In a large part that system is being built in response to *ad hoc* victim-led efforts to find vehicles for redress. By contrast, corporate rights are *very well* protected in international hard law.

Having stated above that the Draft Code was possibly the most consequential attempt to curtail corporate power in the BHR space, it is notable and ironic that those parts of the Code which addressed corporate *rights* have endured and flourished in another form. Bilateral investment treaties (BITs) confer rights, such as guarantees against expropriation and non-discrimination relative to local investors, on a state's investors when they operate in the territory of the other party to the treaty.[192] These substantive rights are often supplemented by significant procedural

[185]See Art. 1.2 of the Treaty, *supra* note 47.

[186]See Birchall, *supra* note 5, at 53.

[187]See also Deva, *supra* note 146, at 103–4.

[188]See Choudhury, *supra* note 14, at 962.

[189]See, e.g., the oral statement by the International Organisation of Employers (IOE) at the eighth meeting of the OEIWG in October 2022, available at www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8/oral-statements. For a more detailed response to an earlier draft, much of which is reflected in the current draft see IOE et al., 'Joint Business Response to the Revised Draft UN Treaty', 10 October 2019, available at www.ioe-emp.org/news/details/1570710367-joint-business-response-to-the-revised-draft-un-treaty.

[190]L. Roorda, 'Caught between Principles and Perfectionism: Private International Law in the Proposed Binding Instrument on Business and Human Rights', *Völkerrechtsblog*, 21 June 2022, available at voelkerrechtsblog.org/caught-between-principles-and-perfectionism/.

[191]See Statement by the USA, as delivered by Catherine Peters, at the OEIWG, 25 October 2021, available at geneva.usmission.gov/2021/10/25/u-s-statement-at-the-open-ended-working-group-on-transnational-corporations-and-other-business-enterprises/. Similar sentiments were expressed by the US at the OEIWG meeting in October 2022.

[192]See S. Joseph, 'Trade Law and Investment Law', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013), 841.

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rights to bring claims against governments before international arbitral tribunals. A win for a company often leads to massive awards of compensation and other ameliorating measures to an investor. States are legally obliged to comply with arbitral awards; failure to do so can attract economic and political pressure from the bilateral party to the BIT, and will jeopardize a state's reputation with foreign investors generally. BITs represent more extensive versions of what was once envisaged as the second half of the UN Code of Conduct for Transnational Corporations. Hence, that contentious second half concerning *rights for* corporations has crystallized into hard law, while the first half, concerning norms of behaviour for corporations, has largely generated only soft law since. International corporate rights are also bolstered by other elements of hard international economic law, such as international trade law under the auspices of the World Trade Organisation (WTO) and the legal power of international financial institutions to coerce states into policies that benefit corporations, such as economic liberalization and privatization, through loan conditionalities.[193] In contrast, the soft UNGPs are weak.

In that respect, it is worth underlining that the drive for harder international BHR law is coming from states in the Global South. Hard law obligations can have some effect in evening out political power between weaker and stronger actors: it can at least act as a constraint on the latter who will almost inevitably prevail against weaker actors (if clashes of interests should arise) where there is no hard law.[194] Yet that is not where we are in the BHR space, with hard law unambiguously favouring corporations rather than their human rights victims.[195]

7. Conclusion

With this overview of the history of the ongoing oscillation between hard and soft international law in the BHR sphere, and with an introduction to some of the more noteworthy recent developments toward the hardening of corporate international human rights duties, we introduce the pieces of our three other contributors in this collection.

The article by Professor Penelope Simons addresses recent BHR developments in Canada, an important jurisdiction given the massive global footprint of its extractive resources industry. It explores developments in transnational corporate human rights litigation in Canada, as well as the establishment of the Canadian Ombudsperson for Responsible Enterprise, both of which have been shaped by corporate power.

The article by Professor Surya Deva addresses the concept of human rights due diligence for business in light of recent legislation on mandatory due diligence in several European states. Such legislation may be a promising measure to help prevent rather than cure BHR abuses, but Deva argues that such hopes are possibly ill-founded. Instead, mandatory due diligence laws, despite their 'hardness', may risk crystallizing process-oriented weak norms that do little to address actual abuses or hold concerned corporate actors accountable.

Finally, the article by Professor Charlotte Villiers addresses hard laws relating to the regulation of companies which obstruct rather than facilitate the imposition of BHR accountability. Such laws include those related to limited liability and separate legal personality. That article again underlines the significant way in which corporate power shapes the debate and the normative terrain.

[193]See also P. Simons, 'The Value-Added of a Treaty to Regulate Transnational Corporations and other Business Enterprises: Moving Forward Strategically', in S. Deva and D. Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (2017), 48 at 64–5.

[194]Ibid., at 65.

[195]See Simons, *supra* note 175, at 41.

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